

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Petition for Rulemaking or,)	
Alternatively, a Waiver of the)	RM-11019
Eligibility Restrictions on C Block)	
Licenses in the Broadband Personal)	
Communications Services)	

OPPOSITION OF COUNCIL TREE COMMUNICATIONS, INC.

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EXECUTIVE SUMMARY

There is no need to reexamine or change the current DE rules yet again.

Scrutiny of the CTIA Petition reveals that CTIA has not established a need to initiate a rulemaking proceeding, nor has it met the Commission's standards for waiver:

- CTIA asserts that "changed circumstances" warrant elimination of the closed bidding requirements. In reality:
 - Any changed circumstances actually underscore why the Commission must maintain the current DE rules, including the entrepreneurs' block, for this auction.
 - Increased consumer demand and spectrum shortages have a greater negative impact on DEs than their larger counterparts, and new entrants face an even higher hurdle.
 - Auction No. 58 should not be viewed as a panacea for major carriers, who have been steadily acquiring additional commercial wireless spectrum outside of the auction process.
 - In Auction No. 35, DEs designed a number of viable business strategies for the use of 10 MHz licenses, and technology developments and the implementation of local number portability have only increased the options in the meantime.
- CTIA asserts that bidding credits alone are more effective in promoting small business participation. In reality:
 - Congress and the Commission have recognized that broadband PCS licenses are highly sought, which makes competing for these licenses against carriers with deep pockets especially difficult.
 - Detailed analysis of spectrum auction results expose the weakness of CTIA's position -- the data very clearly confirm that meaningful small business participation in major auctions has been accomplished almost exclusively through the offering of Closed licenses.

- CTIA explains that NextWave’s “build-out” of many of these licenses presents unique circumstances. In reality:
 - Auction No. 58 is only unique in that it may represent the last immediate opportunity for smaller businesses to acquire broadband PCS spectrum.
 - The fact that any of these licenses may have met minimal build-out rules is irrelevant, given the Commission’s determination that the current DE rules would apply to “any spectrum made available or reclaimed from bankruptcy proceedings in the future.”
- CTIA alleges that open bidding alone promotes the public interest and is consistent with Section 309(j). In reality:
 - Prior to Auction No. 35, the Commission found that the current rules simultaneously serve the public interest and Section 309(j), and determined that the opportunity for smaller businesses to enter the marketplace and provide a competitive alternative to larger carriers is a goal that is just as important as speed of deployment.
 - The results of Auction No. 35 demonstrate the wisdom of the Commission’s judgment -- the 32 DE high bidders in Auction No. 35 won 45 percent of all licenses by value.
- CTIA asserts that the Commission could waive the current rules to permit open bidding for C block licenses available in Auction No. 58. In reality:
 - Even when given a “hard look,” CTIA’s request fails to meet the Commission’s waiver criteria.

In light of this analysis, Council Tree urges the Commission to promptly dismiss the CTIA Petition, and to deny its request for waiver. The Commission should stay the course, and avoid any delay of this auction. Any further weakening of the DE rules denies broadband PCS entry opportunities for small businesses, and businesses owned by minorities and women. If CTIA is seeking to undo the DE program, it should raise its concern to Congress, not the Commission.

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OPPOSITION OF COUNCIL TREE COMMUNICATIONS, INC.

Council Tree Communications, Inc. ("Council Tree"), hereby submits its opposition to the "Petition for Rulemaking, or, Alternatively, a Waiver of the Eligibility Restrictions on C Block Licenses in the Broadband Personal Communications Services" filed by CTIA on July 8, 2004 ("CTIA Petition") in response to the rulemaking notice issued by the Consumer & Governmental Affairs Bureau. 1/ Council Tree has been actively engaged on matters relating to the forthcoming Auction No. 58, 2/ and, like the overwhelming number of parties that have submitted comments to date, is pleased that the Commission has preserved

1/ Consumer & Governmental Affairs Bureau Reference Information Center Petition For Rulemaking Filed, *Public Notice*, Report No. 2663 (rel. July 15, 2004).

2/ Council Tree filed Comments and Reply Comments in response to the Public Notice issued by the Wireless Telecommunications Bureau regarding Auction No. 58. Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Comment Sought on Reserve Prices Or Minimum Opening Bids And Other Auction Procedures, *Public Notice*, ___ FCC Rcd ___, DA 04-1639 (rel. June 18, 2004) ("*Auction No. 58 Public Notice*"). Council Tree respectfully requests that the Commission incorporate its Comments and Reply Comments, which are located on the Wireless Telecommunications Bureau Auction No. 58 website, by reference.

the overall integrity of the designated entity (“DE”) program, including both the bidding credits and, most importantly, the Closed license entrepreneurs’ block bidding.

Council Tree is an investment company organized to identify and develop telecommunications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that the prospects for business success can be predicated on the meaningful diversification of telecommunications facilities ownership. In particular, Council Tree has long been an active supporter of responsibly managed government efforts to encourage the participation of businesses owned by Alaska Native corporations and Indian tribes in the communications industry. As part of this work, Council Tree President Steve C. Hillard is a member of the Commission’s Advisory Committee on Diversity in the Digital Age, and serves as Chairman of the Committee’s Transactional Transparency & Related Outreach Subcommittee.

As set forth below, Council Tree submits that CTIA has not established a need to initiate a rulemaking proceeding, nor has it met the Commission’s standards for waiver. The Commission’s policy rationale from Auction No. 35 remains valid, and there is no need to radically alter the currently effective rules for the forthcoming Auction No. 58, as proposed by CTIA. Thus, Council Tree urges the Commission to promptly dismiss the CTIA Petition, and to deny its request for waiver.

I. CTIA IGNORES THE CRITICAL PUBLIC INTEREST BENEFITS ASSOCIATED WITH A STRONG DE PROGRAM

The CTIA Petition fails to acknowledge the important public interest benefits associated with a strong DE program, and the long-established recognition that a meaningful broadband PCS auction must include closed bidding. Indeed, the CTIA Petition completely ignores Congress's mandate that the Commission ensure DE participation in the provision of spectrum-based services, the Commission's resulting policy and legal findings in creating the broadband PCS entrepreneurs' spectrum block, the unfortunate erosion of DE rules in general (and the PCS C Block rules in particular), the reliance of DEs on the Commission's pronouncements of continued entrepreneurial closed bidding in the broadband PCS C block, and the reasons why bidding credits alone are not sufficient to ensure that DEs will have a meaningful opportunity to acquire broadband PCS licenses.

It is impossible to analyze the CTIA Petition in isolation, or as a case of first impression. The truth is that, due in part to a request from CTIA, ^{3/} the Commission has already concluded that the current DE rules, including the entrepreneurs' block, are a "fair and appropriate" means to further develop wireless competition while also providing a meaningful opportunity for new entrepreneurial firms to enter the market. ^{4/} Yet, CTIA has asked the Commission to ignore the

^{3/} See Cellular Telecommunications Industry Association's Petition for Rule Making Concerning the Broadband PCS Entrepreneurs' Block Rules (filed on Apr. 17, 2000 in WT Docket No. 97-82).

^{4/} Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report &*

hard work it completed just four years ago, thereby substantially delaying the start of the auction and generating considerable regulatory uncertainty for all potential bidders. Should it elect to again reexamine the fundamentals that led to development of the current DE rules, the Commission will surely conclude that the current DE rules must be preserved and the CTIA Petition must be dismissed, and its request for waiver denied.

A. Congress And The Commission Have Long Recognized The Need To Promote Diversity In The Wireless Industry By Stimulating Market Entry By Smaller Businesses, And Businesses Owned By Minorities And Women

Congress and the Commission have long recognized the need to increase diversity in the wireless marketplace by promoting the entry of smaller businesses, and businesses owned by minorities and women. This was apparent even before the advent of the Commission's competitive bidding authority, as evidenced by a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries. 5/

According to the Report:

One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could

Order and Order on Reconsideration, 15 FCC Rcd 16266 (2000) ("*Sixth Report & Order*") at 16278-79 ¶ 23.

5/ H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

inadvertently have the effect of favoring only those with ‘deep pockets,’ and would therefore have the wherewithal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new companies or start-ups. 6/

On that basis, as part of the grant of auction authority under Section 309(j), Congress directed the Commission to promote the dissemination of “licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,” 7/ and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services” 8/ Congress also authorized the Commission to consider a wide range of options, including bidding preferences, to ensure such opportunity. 9/

In implementing its competitive bidding authority, the Commission followed Congress’s lead, stating:

We agree [with Congress] that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a

6/ *Id.* at 255.

7/ 47 U.S.C. § 309(j)(3)(B).

8/ 47 U.S.C. § 309(j)(4)(D).

9/ *Id.*

market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. 10/

Against this background, the Commission expressly set aside broadband PCS blocks C and F for bidding only by “entrepreneurial” companies. 11/ As the Commission later made clear, it created these entrepreneurs’ blocks with the expectation that bidding credits and installment payment terms alone would not enable smaller businesses to overcome the substantial advantage held by the well-financed entrenched service providers:

[I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without insulation of the entrepreneurs’ block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS. 12/

Thus, the Commission ensured “meaningful opportunities” for smaller businesses, and businesses owned by minority groups and women, by creating an auction process whereby smaller businesses, in addition to receiving bidding credits and other incentives, would not have to bid against behemoth companies with well-

10/ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report & Order*, 9 FCC Rcd 5532 (1994) (“*Competitive Bidding Fifth Report & Order*”) at 5585 ¶121.

11/ *Id.* The Commission defined an entrepreneur as an entity with gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million, and supplemented the creation of the entrepreneurs’ license blocks with additional benefits available to entrepreneurs who fell within specific DE categories.

12/ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403, 414-15 ¶ 16 (1994).

documented access to the capital markets. Like Congress, the Commission realized that the availability of the entrepreneurs' block was necessary to ensure that a group of diverse entities would have the ability to gain access to the wireless marketplace.

B. Despite Congress's Clear Mandate, The DE Rules In General, And The Broadband PCS C Block DE Rules In Particular, Have Already Been Significantly Eroded

As discussed above, the DE program was created to secure opportunities to participate in the provision of spectrum-based services for those who would otherwise be excluded under a system of competitive bidding. The Commission recognized early on that DEs would need assistance attracting the significant financing needed to win licenses in competitive bidding, and to provide service thereafter. This problem is particularly acute in the case of a capital-intensive service such as broadband PCS:

because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services. In our view, these steps and the others we adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provisions of PCS. 13/

In light of this recognition, the Commission: 1) set aside two spectrum blocks (one 30 MHz block and one 10 MHz block) for bidding by smaller businesses only; (2)

13/ *Competitive Bidding Fifth Report & Order*, 9 FCC Rcd 5572-73 ¶ 96.

offered bidding credits to smaller businesses and businesses owned by members of minority groups and women; (3) permitted DEs to pay for certain licenses in installments; (4) offered a tax certificate for businesses owned by members of minority groups and women; and (5) reduced the upfront payment required for DEs to bid for licenses in the entrepreneurs' spectrum blocks. 14/

Since that time, however, the number of incentives available to DEs in competitive bidding has declined significantly. In 1995, Congress eliminated the availability of tax certificates for members of minority groups. 15/ For its part, the Commission no longer offers the installment payment financing that enhanced the ability of smaller businesses to acquire licenses in competitive bidding, 16/ no longer permits smaller businesses to qualify for an auction with a reduced upfront payment, 17/ and, with the exception of spectrum bands that had previously been reserved, no longer sets aside licenses for bidding only by DEs. 18/

14/ *Id.*, 9 FCC Rcd 5580 ¶ 113.

15/ *See* Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995).

16/ Amendment of Part 1 of the Commission's Rules – Competitive Bidding procedures, *Order on Reconsideration of the Third Report & Order and Fifth Report & Order*, 15 FCC Rcd 15293, 15322 ¶ 55 (2000).

17/ *See, e.g.*, Amendment of Parts 20 & 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report & Order*, 11 FCC Rcd 7824, 7859-61 ¶ 76-79 (1996).

18/ *See, e.g.*, Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report & Order*, 18 FCC Rcd 25162, 25189-90 ¶ 68 (2003).

In addition, although it originally permitted DEs to enter into management or joint marketing agreements with experienced firms without contravening the attribution thresholds set forth in its DE rules, 19/ the Commission now treats many such agreements as attributable under the controlling interest standard. 20/ The threat of such attribution effectively places many strategic relationships with existing major carriers – providers that benefit from economies of scale and scope – outside the reach of new entrants.

Most recently, prior to Auction No. 35, the Commission significantly weakened the DE rules for the broadband PCS C and F Blocks, particularly the entrepreneurs' block, in the face of aggressive lobbying by CTIA and its major carrier members. Among other things, the Commission: (1) decreased each 30 MHz C block license into three 10 MHz C block licenses; (2) carved the Basic Trading Areas ("BTAs") into two tiers according to the population size of the BTA (with Tier 1 comprising BTAs with populations equal to or greater than 2.5 million, and Tier 2 comprising the remaining BTAs); and (3) eliminated the DE restrictions and permitted open bidding for: (i) two of the three 10 MHz C block licenses in Tier 1, (ii)

19/ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Fourth Report & Order*, 9 FCC Rcd 7124 ¶ 6 ("[w]e expect that investor/manager agreements are one of the many alternatives available to [DEs] ...[t]his does not mean, however, that these management agreements will be deemed 'attributable' for purposes of the revenue thresholds in the entrepreneurs' blocks"); *Competitive Bidding Fifth Report & Order*, 9 FCC Rcd 5601 ¶ 158 n.135 ("[s]o long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants").

20/ See 47 C.F.R. § 1.2110(c)(2)(ii)(H)-(I).

one of the three 10 MHz C block licenses in Tier 2, (iii) all 15 MHz C block licenses in Tier 1, (iv) all F block licenses, and (v) all C block licenses available but unsold in Auction No. 22. 21/

It is also important to keep in mind that, although it weakened the DE rules prior to Auction No. 35, the Commission determined that the current DE rules would apply to “any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future.” 22/ Smaller carriers have relied on this pronouncement, which is also embedded in the Commission’s rules. 23/ It is also significant that neither CTIA nor its members sought reconsideration of or otherwise appealed the Commission’s ruling.

Thus, despite the fact that barriers to entry remain formidable, the resources intended to assist DEs in the provision of spectrum-based services have become more scarce. The erosion of the DE rules has allowed non-DEs to freely acquire some of the most valuable broadband PCS licenses – licenses that Congress and the Commission originally envisioned for DEs.

21/ See *Sixth Report & Order*.

22/ *Sixth Report & Order*, 15 FCC Rcd 16267 ¶ 1; FCC Revises Rules For Upcoming C and F Block Auction: The Rapid Deployment of Wireless Services, *FCC News Release* (rel. Aug. 25, 2000). See also Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS), *Order on Reconsideration*, 16 FCC Rcd 1343, 1345 ¶ 6 (2001); 47 C.F.R. §§ 24.229(b), 24.709(a).

23/ *Id.*

C. The Commission Must Maintain Its Scaled-Back Entrepreneurs' Block For Auction No. 58, As Bidding Credits Alone Are Meaningless For A Broadband PCS Auction

Only the current DE rules, albeit with an already limited and scaled-back entrepreneurs' block bidding opportunity, can satisfy Congress's directive that the Commission establish a meaningful program to enhance diversity and promote small business presence in the wireless communications marketplace. An offering of bidding credits alone, as advocated by CTIA, would be ineffective for broadband PCS spectrum.

As discussed above, it is impossible to compare broadband PCS spectrum with spectrum that is auctioned pursuant to bidding credits alone because, as Congress and the Commission have recognized, PCS licenses are highly sought and capital-intensive, which makes competing for valuable licenses against entrenched telecommunications providers especially difficult. Larger providers have markedly greater resources than less established or new enterprises, and they are able to link those resources with their industry expertise to dominate the wireless market.

Contrary to the statements made by CTIA, bidding credits alone are inadequate for DE participants to obtain meaningful amounts of broadband PCS spectrum. 24/ Careful examination and granular analysis of FCC auction results expose the weakness of CTIA's position. As detailed in Attachment 1, analysis of FCC auctions reveals that Closed licenses are absolutely key to DE success. The data for auctions of \$50 million or more reflect that:

24/ CTIA Petition at 13-16.

- 82 percent of all DE auction winnings come from Closed auctions
- DEs fare poorly with bidding credits alone when competing against deep-pocketed large carriers, most notably in broadband PCS auctions
- DEs fare reasonably well with bidding credits in smaller auctions with more limited big carrier competition
- DEs fail altogether with no bidding credits or Closed licenses, particularly in broadband PCS auctions

These numbers bolster the Commission's own conclusions that bidding credits alone are wholly insufficient for DEs to compete directly with deep-pocketed carriers, and support retaining Closed license bidding in the upcoming Auction No. 58.

II. THE COMMISSION MUST NOT CHANGE THE ENTREPRENEURS' BLOCK RULES YET AGAIN

The CTIA Petition has presented no new factual developments that justify either a rulemaking to "reexamine" the current DE rules, or a waiver. In fact, all of the assumptions, alleged changed circumstances, and gloomy characterizations about DE businesses contained in the CTIA Petition are easily rebutted, and do not reflect any exceptional or unique circumstances. Moreover, examination of the current state of the wireless industry demonstrates that the entrepreneurs' block is especially necessary. For these reasons, CTIA fails to demonstrate why a rulemaking is needed, or that a waiver is justified.

A. CTIA Has Presented No New Developments That Justify Eliminating the Entrepreneurs' Block

First, the "changed circumstances" cited by CTIA – increased consumer demand and spectrum shortages -- actually underscore why the Commission must maintain the current DE rules, including the entrepreneurs' block, for this auction. Today's marketplace is characterized by spectrum aggregation – aggregation that has been hastened by the Commission's decision to eliminate the CMRS spectrum cap. In an environment where smaller carriers and new entrants find it extremely difficult to acquire spectrum, it is all the more important that the Commission take proactive measures to ensure competition, innovation, and related consumer benefits.

To the extent that increased consumer demand and spectrum shortages exist any more now than previously, this relatively minor auction for spectrum in smaller market areas already offers 115 Open licenses – available for all bidders. 25/ Given its small scope, Auction No. 58 should not be viewed as a panacea for major carriers, who have been steadily acquiring additional commercial wireless spectrum as a result of mergers, 26/ major spectrum purchases, 27/ and FCC rulemakings, 28/ as

25/ *Auction No. 58 Public Notice, Attachment A - Part 1.*

26/ *See AT&T Wireless Services, Inc. and Cingular Wireless Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, Public Notice, 19 FCC Rcd 6185 (2004).*

27/ *See, e.g., Qwest Wireless, LLC and Cellco Partnership d/b/a Verizon Wireless Seek Commission Consent for the Assignment of Sixty-Two Broadband Personal Communications Services Licenses, Public Notice, ___ FCC Rcd ___, DA 04-2254 (rel. July 22, 2004); Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal*

well as through spectrum acquisitions in alternative bands. ^{29/} The major carriers have made clear their desire for additional spectrum rights, ^{30/} and one such carrier reported that “many, if not most, [initial Advanced Wireless Service licensees] will be existing CMRS carriers.” ^{31/}

Moreover, increased consumer demand and spectrum shortages have a greater negative impact on DEs than their larger counterparts. Like the larger carriers, smaller carriers are also struggling to satisfy their coverage and capacity needs, and are experiencing the effects of increased consumer demand combined with an extremely limited ability to purchase or otherwise acquire additional spectrum. New entrants, for whom the DE program was designed, face an even higher hurdle.

Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, *Memorandum Opinion & Order*, 19 FCC Rcd 2570 (2004); Applications of Northcoast Communications, LLC and Celco Partnership d/b/a Verizon Wireless For Consent to Assignment of Licenses, *Memorandum Opinion & Order*, 18 FCC Rcd 6490 (2003).

^{28/} See FCC Adopts Solution To Interference Problem Faced By 800 MHz Public Safety Radio Systems, *FCC News Release* (July 8, 2004) (explaining Commission’s decision to, among other things, modify Nextel’s licenses to permit Nextel to operate in the 1910-1915 MHz and 1990-1995 MHz bands).

^{29/} See, e.g., Wireless Telecommunications Bureau Grants Consent To Assign Multipoint Distribution Service Station Licenses, *Public Notice*, 19 FCC Rcd 6329 (2004) (permitting Nucentrix to assign its 2.5 GHz MDS licenses to Nextel).

^{30/} See, e.g., T-Mobile USA, Inc., Petition for Reconsideration, WT Docket No. 02-353 (filed Mar. 8, 2004) at 2, n.2.

^{31/} AT&T Wireless Services, Inc., Comments, WT Docket No. 02-353 (filed Feb. 7, 2003) at 4.

Second, the fact that NextWave arguably met the build-out deadlines associated with the licenses to be sold in Auction No. 58 is irrelevant, and does not provide an adequate basis for granting a waiver. The cited goals of “fairness and consistency” do not support granting a waiver – in fact, the opposite is true. 32/ As noted earlier, prior to Auction No. 35, the Commission decided that the current DE rules would apply to “any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future.” 33/ Therefore, the Commission anticipated the very circumstances present here and long ago determined that any reclaimed NextWave licenses would be subject to the current DE rules, including the entrepreneurs’ block, regardless of whether any preliminary build-out criteria were met. 34/

There are two additional important points in this regard. First, it is important to remember that the Commission has consistently aimed to keep Closed licenses in the hands of DEs for as long as possible, and embedded this intention in Section 24.839 of its rules. 35/ By permitting unrestricted bidding on the NextWave spectrum, the Commission would directly contravene this long-held goal. Moreover, although NextWave has technically met the Commission’s build-out criteria, the

32/ CTIA Petition at 12.

33/ See *supra*, n.22.

34/ CTIA Petition at 11.

35/ See 47 C.F.R. § 24.839, which was adopted in order to ensure that DEs could not immediately assign or transfer control of the licenses to larger entities. Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report & Order*, 9 FCC Rcd 5532, 5588-89 ¶¶128-29 (1994).

company has not offered service to paying customers on these licenses, and therefore NextWave is not currently a competitive alternative.

Third, Auction No. 58 is unique in that it may represent the last immediate opportunity for smaller businesses to acquire broadband PCS spectrum. As CTIA acknowledges, the *NextWave* ruling prevented DE participants from fully realizing the opportunity presented by Auction No. 35, for which the current rules were crafted. ^{36/} Rather than scuttling the rules promulgated especially for Auction No. 35, a “fair and consistent” course would be to maintain the current DE rules. By doing so, the Commission would allow *all* auction participants to benefit from the careful balancing it undertook prior to Auction No. 35, and would allow DEs – many of whom were deprived of their ability to access additional spectrum on account of the Supreme Court’s decision invalidating a significant portion of Auction No. 35 – to have a fair chance to acquire broadband PCS spectrum in this last near-term broadband PCS spectrum auction.

Fourth, as previously noted, the data shows that bidding credits are definitely not adequate for broadband PCS auctions, and DEs are able to successfully acquire meaningful amounts of spectrum only through Closed license bidding. Therefore, CTIA is incorrect when it argues that open bidding will “facilitate wireless competition and innovation, while still allowing small businesses to acquire the licenses through bidding credits.” ^{37/}

^{36/} CTIA Petition at 11.

^{37/} *Id.* at 17.

Finally, CTIA's other arguments are just as easily rebutted. First, as discussed in Section IV, below, DEs are not only financially sound, but have made major contributions to the wireless industry. Second, DEs do not "flip" licenses any more often than other wireless industry participants (and the Commission's rules expressly prevent all entities from doing so). ^{38/} Third, alleged DE licensing delays, to the extent they occur, are *de minimus*, irrelevant and, would exist even if the Commission were to offer only bidding credits, as CTIA suggests. ^{39/} Finally, as discussed in Section V, below, the need to "fix" certain elements of the DE program does not mean the program should be abandoned, but merely reflects the need to make a few simple changes so that it continues to serve its original goals.

Thus, resolving now to upend the eligibility parameters for Auction No. 58 would substantially delay the start of the auction and would generate considerable regulatory uncertainty for all potential bidders. ^{40/} No party will be able to put the

^{38/} See 47 C.F.R. § 1.948(i). See also *id.* at § 1.2110(m), providing that applicants and licensees claiming DE eligibility are subject to audit by the Commission, and that selection for such audit "may be random, on information, or on the basis of other factors."

^{39/} CTIA Petition at 10. Among other things, the Commission's rules provide DEs must describe on their long-form applications how they satisfy the requirements for eligibility for DE status. 47 C.F.R. § 1.2110(j). Thus, the Commission has an obligation to examine a DE's qualifications whether the entity participates in open or closed bidding.

^{40/} Avoiding uncertainty is particularly important in the context of the Commission's entrepreneurs' block. The Commission has frequently undertaken to preserve settled expectations and existing business relationships as a way to promote investment in DE auction applicants, and limiting the prospects for challenge is a critical part of that effort. See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, *Second Report & Order*, 12 FCC Rcd 16448 (1997)

spectrum at issue to use if the forthcoming reauction is delayed. Given these compelling factors, the Commission must make clear that its existing entrepreneurs' block eligibility limitations will be enforced in Auction No. 58.

B. The Entrepreneurs' Block Is Especially Necessary In Today's Wireless Marketplace

In addition to the points discussed immediately above, there are a number of additional reasons why the entrepreneurs' block is especially necessary in today's wireless marketplace. First, when the Commission developed the current DE rules, it struck a balance between the various goals of Section 309(j). ^{41/} The Commission considered the equities among different and competing interests and determined that it could simultaneously promote the participation of small businesses in PCS auctions, the introduction of competition, and the rapid deployment of new technologies and services. ^{42/} Thus, the fact that smaller, more diverse entities may need additional time to finance and build-out their systems, is not an issue of any consequence, particularly because the Commission's rules require all licensees

(applying existing C block eligibility rules to the C block reauction); Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Spectrum, Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report & Order*, 11 FCC Rcd 7824, 7837-39 ¶¶ 24-27 (1996) (applying existing C block eligibility rules to the F block auction). *See also Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30, 634 (D.C. Cir. 1996) (noting the Commission's efforts to preserve existing C block auction business relationships following the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*).

^{41/} *Sixth Report & Order*, 15 FCC Rcd 16278-79 ¶ 23.

^{42/} *Id.*, 15 FCC Rcd 16278 ¶ 22.

to meet performance requirements to ensure prompt delivery of service. ^{43/} The fact that these entities would provide a competitive alternative to larger carriers is a goal that is just as important as speed of deployment.

Despite the Commission's efforts, minorities remain significantly underrepresented in the communications industry, even though they continue to make up increasingly larger percentages of the U.S. population, as the Commission itself has recognized in forming the Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Advisory Committee"). ^{44/} Indeed, the Diversity Advisory Committee recently informed the Commission that it must "maintain and expand" the DE program, and expressly noted the need for the Commission to use its statutory authority to enhance diversity "actively, often, and in all spectrum auctions." ^{45/} Indeed, two of the subcommittees are exploring different mechanisms to expand opportunities for DEs, including: (1) creating a diversity credits program, ^{46/} and (2) providing a transferable credit or voucher to

^{43/} See, e.g., 24 C.F.R. § 24.203 (Broadband PCS construction requirements).

^{44/} See U.S. Census Bureau, *Statistical Abstract of the United States: 2000, Resident Population by Race* at 17 (indicating a rise in minority population from 20% to 29% from 1980 to 2000, and projecting a rise to almost 35% by 2015); Advisory Committee on Diversity in the Digital Age Holds Inaugural Meeting: Defines Mission, *FCC News Release* (Sept. 30, 2003).

^{45/} Diversity Advisory Committee Transactional Transparency and Related Outreach Subcommittee, *Preliminary Report & Recommendations* at 3 (May 14, 2004); see also Diversity Advisory Committee Adopts Interim Reports & Recommendations, Committee Recommends Use of Tax Policy To Promote Opportunity, Supports Expansion of FCC's Rule-Based Incentives, and Reports On Industry Best Practices, *FCC News Release* (June 14, 2004).

^{46/} *Id.*

spectrum license winners that enter into an agreement or transaction with a socially-disadvantaged business, 47/

Citing the work of this committee, Commissioner Abernathy recently acknowledged the need to “step back and think creatively about how we can enhance women’s and minorities’ participation in industry transactions, including ensuring that there is ... access to capital needed to participate in such transactions[.]” and stressed “the need to focus not just on the traditional media, ... but on opportunities in newly developing industries utilizing new technologies.” 48/ The current DE rules provide a realistic avenue for businesses owned by minority groups and women to gain such ownership opportunities, and serve to remedy the paucity of real minority participation in the wireless industry.

Moreover, as noted earlier, DEs and others have relied upon the Commission’s commitment to retain the current DE rules for any future auction involving this broadband PCS spectrum. As a result, the current DE rules would actually speed the delivery of new services to the public by fulfilling well-settled expectations, therefore reducing transaction costs because lenders, investors and smaller carriers in particular rely on the Commission’s pronouncements, especially in connection with the Commission’s requirements for preparing and filing the requisite auction-related transaction documents. Additionally, CTIA overlooks the

47/ Diversity Advisory Committee Emerging Technology Subcommittee Preliminary Recommendations at 2 (May 14, 2004).

48/ Remarks of Commissioner Kathleen Q. Abernathy, *Diversity is Good Business*, MMTC Conference on Building and Financing Minority Broadcast Companies (July 20, 2004).

fact that the current DE rules, by allowing larger carriers to make non-attributable investments in DEs, permit large carriers to pursue an interest in entrepreneurs' block licensees, albeit as passive investors.

Unfortunately, the Commission's policies have not eliminated the challenges associated with the shortage of commercial wireless spectrum. First, disaggregation and partitioning have not been widely utilized and therefore are not sufficient to satisfy carriers' spectrum needs. ^{49/} Second, utilization of the Commission's spectrum leasing rules has been tepid, suggesting that it is far more desirable for mobile providers to hold their own licenses. ^{50/}

Finally, small businesses make significant contributions to the American economy, and provide countless public interest benefits as a result, as discussed in Section IV, immediately below. Furthermore, as explained thereafter in Section V, wireless consolidation highlights the need to ensure new entry opportunities to benefit consumers and ensure future competition and innovation in the wireless industry.

^{49/} See, e.g., Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Notice of Inquiry*, 17 FCC Rcd 25554, 25558-59 ¶ 8 (2002).

^{50/} A recent search of the FCC's Universal Licensing System ("ULS") database shows that to date, the Commission has granted only 24 applications for permission to lease spectrum, representing 10 different applicants. In fact, only 25 spectrum holding entities have even filed applications. (We note that these figures count Nextel as a single entity, and that the Commission has granted certain of the applications filed by various Nextel subsidiaries.)

III. SMALL BUSINESSES PROVIDE SIGNIFICANT PUBLIC INTEREST BENEFITS AND DESIGNATED ENTITIES HAVE A SOLID HISTORY OF OFFERING INNOVATIVE SERVICES

The CTIA Petition ignores the significant societal and public interest benefits provided by small businesses, as well as DE companies' solid record of offering innovative services. Small businesses, such as DEs, innovate better than their larger competitors, are able to more flexibly respond to market conditions, are more attentive to the preferences of their customers, and provide the life-blood of the U.S. economy. Therefore, these companies can be more adept at developing innovative, niche services that operate profitably. By comparison, CTIA represents that larger carriers need additional spectrum to fill coverage gaps and improve upon their existing service offerings. 51/ This business plan is not innovative and does not hinge upon availability of entrepreneurs' block spectrum, given other means available to large carriers to acquire spectrum.

In fact, the Office of Communications Business Opportunities ("OCBO") recently informed the Commission that small businesses are "an important component of the thriving telecommunications sector of the U.S. economy." 52/ In particular, 97.9 percent of U.S. telecommunications field employees are small

51/ CTIA Petition at 6-7.

52/ See Presentation of Office of Communications Business Opportunities at Jan. 15, 2004 Commission Meeting, *available at* <http://www.fcc.gov/realaudio/presentations/2004/011504>.

businesses, and 60-80 percent of new jobs are generated by such small businesses. 53/

There are a number of successful DE businesses offering innovative services to a broad range of customers. These small businesses have likely weathered the recent economic downturn through effective decision-making and nimble management. In fact, the Commission recently found that economic circumstances hinder large as well as small carriers in its *Auction No. 35 Final Refund Order*. There, the Commission justified economic relief for individual eligible Auction No. 35 winning bidders – large and small alike – based in part on an ample record that demonstrated the “worsening economic conditions in the wireless industry[.]” 54/

The “failures” of certain broadband PCS C and F block licensees cannot be blamed on the DE eligibility rules, but on a combination of other circumstances that are no longer relevant in this auction. Indeed, the success of Auction No. 35 – before it was undone – shows otherwise. In Auction No. 35, national carrier Verizon Wireless bid \$8.8 billion for wireless spectrum. At the same time, DE participant Alaska Native Wireless was the second highest winning bidder – bidding \$2.9 billion. Even more impressive, analysis reveals that the 32 DE high bidders in Auction No. 35 won 45 percent of all licenses by value, thereby demonstrating that

53/ *Id.*

54/ Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35, Requests for Refunds of Down Payments Made In Auction No. 35, *Order & Order on Reconsideration*, 17 FCC Rcd 23354, 23362 ¶ 10 (2002).

DE participants contributed to the overall strong showing of all auction participants. Indeed, these auction results plainly demonstrate – in real terms – that the current rules provide an equitable opportunity for all types of bidders, whether large or small.

In Auction No. 35, DEs designed a number of viable business strategies for using the 10 MHz licenses available in Auction No. 58, and technology developments have only increased the options available for these licenses. Likewise, local number portability will make it easier for these new DE businesses to compete against established incumbent carriers and to lure customers with innovative, low cost services. In any event, as discussed in Section II.A. above, the DE program was not intended as a guarantee of business success, but as a means to diversify the wireless communications marketplace.

IV. TO OFFSET THE ONGOING CONCENTRATION OF WIRELESS LICENSES, THE COMMISSION MUST STRENGTHEN THE DE PROGRAM

As a preliminary matter, we note that the Commission has an ongoing obligation to examine, and retune if necessary, all of its rules, and the DE rules are no exception. There is a big difference, however, between fixing the DE rules -- an effort that the Commission undertook prior to Auction No. 35 -- and eliminating the program entirely. As noted previously, the current DE rules, which include the entrepreneurs' block, have proven highly successful, and there is no need to eliminate them. The mere need for a few selective changes to the DE rules does not support ignoring them entirely for this auction, as CTIA would maintain. Moreover,

the modifications previously recommended by Council Tree – offering of additional Closed licenses, adopting a personal net worth limitation, and reducing the minimum opening bids – do not require a lengthy, drawn out proceeding, and would mitigate the ongoing concentration of wireless licenses by strengthening the existing DE program.

Council Tree has provided a compelling justification for the offering of additional Closed licenses and has asked the Commission to re-designate sufficient Open licenses as Closed in order to increase the Closed licenses to the same level as in Auction No. 35, or to re-designate licenses in 17 markets from Open to Closed. 55/ Likewise, the Commission should adopt Council Tree’s pending proposal for a personal net worth limitation in conjunction with Auction No. 58. As this auction may be the last immediate opportunity for DEs to secure PCS licenses, it is especially important that the DE rules ensure that only those bidders truly deserving DE status are eligible. High net worth individuals, masquerading as DEs, must not be allowed to usurp opportunities from legitimate DEs.

V. THE WAIVER REQUEST SET FORTH IN THE CTIA PETITION FAILS TO MEET THE COMMISSION’S WAIVER STANDARDS

Even when given a “hard look,” the waiver request set forth in the CTIA Petition fails to meet the Commission’s criteria for waiver. As set forth below, granting the waiver request would be wholly inappropriate because doing so would

55/ Council Tree Comments at 8.

frustrate the fundamental policy objectives of the DE rules, and would contradict the public interest.

Pursuant to Section 1.925 of its rules, the Commission may grant a waiver if it is shown that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative. ^{56/} The CTIA waiver request fails both of these tests.

As a preliminary matter, we note that CTIA's request for a waiver is entirely inappropriate, as the association is really seeking broad relief from an existing rule for all parties. ^{57/} At its core, the request seeks a complete elimination of the entrepreneurs' block rules, not a narrowly tailored exception with a limited purpose. Likewise, the "applicant" here is not one party or entity, but an entire industry, which also demonstrates that a waiver is not the appropriate vehicle for CTIA's request.

With respect to the substance of the waiver request, as discussed in Section II.A., above, the underlying purpose of the DE rules is to stimulate the ability of diverse entities to gain access to the wireless marketplace. Waiving the DE rules to

^{56/} 47 C.F.R. § 1.925(a)(3)(i)-(ii).

^{57/} "[T]he essence of a waiver is a narrow, particularized exception to a rule based on a showing by a particular party that such an exception will not subvert the rule under that party's unique circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

permit open bidding for all Auction No. 58 licenses, as proposed by CTIA, would restrict the ability of DEs to obtain spectrum in the auction, and would hinder wireless competition and innovation, as discussed in Section II.C., above.

Second, eliminating the entrepreneurs' block rules would not serve the public interest. At a minimum, CTIA's proposal would instead: (1) contravene Congress's and the Commission's early recognition that diversity is a key means of stimulating competition (Section II.A., above), (2) upset well-settled expectations and lead to even more regulatory or judicial delay (Section III.A., above), (3) significantly curtail the important societal benefits provided by smaller businesses (Section IV, above), and (4) lead to increased wireless license consolidation (Section V, above).

Third, CTIA cannot realistically argue that there are unique or unusual factual circumstances present. As noted in Section III.A. above, the only thing unique about Auction No. 58 is that it may be last immediate opportunity for DEs to acquire broadband PCS spectrum. Of course, this factor actually favors maintaining the current DE rules, especially given their underlying purpose and the current state of wireless consolidation.

Finally, conducting the auction under the current DE rules does not prevent or hamper any interested entity from participating in Auction No. 58, nor from acquiring broadband PCS spectrum within the wireless marketplace. Additionally, with respect to large carriers, the current rules permit them to bid outright for many licenses, and to make passive investments in qualified Closed license bidders. The current rules further provide that "any C block license that has been offered,

but not won by a bidder, in closed bidding in any auction beginning on or after March 23, 1999, will not be subject in a subsequent auction to closed bidding pursuant to the eligibility requirements of this section.” ^{58/} Under this provision, therefore, any Closed licenses that go unsold in Auction No. 58 will be available to all potential bidders – including large incumbent carriers – in open bidding in a subsequent reauction. Thus, CTIA cannot argue that its members (or anyone else) are without a “reasonable alternative.” DEs, however, may have no other opportunities available to acquire broadband PCS spectrum, either for new or ongoing businesses.

VI. CONCLUSION

CTIA has not established a need to initiate a rulemaking proceeding, nor has it met the Commission’s standards for waiver. There is no need for the Commission to engage in yet another lengthy effort – and delay this auction – to reexamine or change the compromise rules developed just four years ago. To the extent that CTIA seeks to rewrite Congress’s directive, it should seek redress there.

First, CTIA argues that “changed circumstances” warrant elimination of the closed bidding requirements, due to increased consumer demand and the shortage of suitable wireless spectrum. In contrast, any changed circumstances actually underscore why the Commission must maintain the current DE rules, including the entrepreneurs’ block, for this auction -- increased consumer demand and spectrum shortages have a greater negative impact on DEs than their larger counterparts.

^{58/} 47 C.F.R. § 24.709(a)(4)(ii).

Furthermore, Auction No. 58 should not be viewed as a panacea for major carriers, who have managed to steadily acquire additional commercial wireless spectrum despite the present situation. Moreover, in Auction No. 35, DEs designed a number of viable business strategies for the use of 10 MHz licenses, and technology developments and the implementation of local number portability have only increased the options in the meantime. These licenses will be especially significant for new entrants seeking to develop niche service offerings, among other uses.

Second, CTIA asserts that bidding credits alone are more effective in promoting small business participation. Council Tree responds that Congress and the Commission have recognized that broadband PCS licenses are highly sought, which makes competing for these licenses against carriers with deep pockets especially difficult. In addition, a careful examination and analysis of spectrum auction results expose the weakness of CTIA's position. The data very clearly confirm that meaningful DE participation has been accomplished almost exclusively through the offering of Closed licenses.

Third, CTIA states that Auction No. 58 is unique because NextWave has already "built-out" its licenses. Instead, Auction No. 58 is unique because it may represent the last immediate opportunity for smaller businesses to acquire broadband PCS spectrum. The Commission has already determined, in a widely announced ruling, that the current DE rules would apply to "any spectrum made available or reclaimed from bankruptcy proceedings in the future."

Fourth, CTIA alleges that open bidding alone promotes the public interest and is consistent with Section 309(j). Council Tree notes that, in 2000, the Commission held that the current rules serve the goals set by Congress, finding that the opportunity for smaller businesses to enter the marketplace and provide a competitive alternative to larger carriers is just as important as speed of deployment. And, the results of Auction No. 35 demonstrate the success of the current rules -- the 32 DE high bidders in Auction No. 35 won 45 percent of all licenses by value.

Finally, CTIA asks the Commission to waive the rules to permit open bidding for C block licenses available in Auction No. 58. Council Tree finds that, even when given a "hard look," the request fails to meet the Commission's waiver criteria. Moreover, we note that CTIA's request is entirely inappropriate, as the association is actually seeking broad relief from an existing rule for all parties, rather than a narrowly tailored exception with a limited purpose for a specific party.

Accordingly, Council Tree urges the Commission to promptly dismiss the CTIA Petition, and to deny its request for waiver.

Respectfully submitted,

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ATTACHMENT 1**Competitive Bidding Eligibility Restrictions Are Critical if
Designated Entities are to Have an Opportunity to Participate
Meaningfully in the Wireless Telecommunications Industry**

CTIA claims that the use of bidding credits alone in Auction No. 58 “will enhance the ability of small businesses to compete successfully against other bidders.”¹ Yet, auction statistics do not support CTIA’s claim. Instead, data confirms that meaningful designated entity (“DE”) success in Commission spectrum auctions has been achieved almost exclusively through the use of eligibility restrictions for bidding on certain licenses (“Closed Bidding”). These statistics reveal the truth of the Commission’s 1994 determination that DE auction success would be hard to secure in capital-intensive services “unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against.”²

TABLE 1**DE Winnings for 50 Auctions – by \$ Amount**

Groupings for Auctions > \$50 Million	DEs	Total	DE %
	<i>(\$ in billions)</i>		
(1) Closed broadband PCS license auctions (Entrepreneurs only)	\$16.5	\$16.5	100%
.....			
(2) Open auctions with bidding credits:			
(2a) Auctions with dominant large carrier bidders	2.5	13.5	19%
{without Salmon PCS outlier}	{0.9}	{13.5}	{6%}
.....			
(2b) Auctions without dominant large carrier bidders	1.0	1.9	51%
.....			
(3) Auctions without bidding credits or Closed licenses	0.1	9.8	1%
.....			
(4) All small auctions (<\$50 million)	0.1	0.2	33%
.....			
Total 50 ⁽⁵⁾ wireless auctions	\$20.2	\$42.0	48%

Notes to Table 1 (above) and Table 2 (below)

(1) 5 Auctions: 5, 10, 11 (F block only), 22 and 35 (Closed only)

(2a) 6 Auctions: 1, 3, 16, 33, 34 and 35 (Open only)

Dominant bidders defined as one or more of the large national incumbent carriers who together won 25% or more in given auction

(2b) 9 Auctions: 2, 6, 7, 17, 25, 30, 44, 49, 53

(3) 5 Auctions: 4, 8, 9, 11 (D&E Block), 15

(4) 28 Auctions: all auctions below \$50 million

(5) Data excludes recent auctions: 52 and 54

Line (1) of TABLE 1 shows that DEs actively participated in five auctions with Closed Bidding (in each case, for broadband PCS C and F block licenses), placing net winning bids totaling \$16.5 billion. These licenses have given DEs a very meaningful stake in the United States wireless industry. The broadband PCS C and F blocks represent 40 MHz of the 120 MHz of broadband PCS spectrum that the Commission has licensed through competitive bidding in the last 10 years. This original 40 MHz set-aside for entrepreneurs represents 33 percent of broadband PCS spectrum licensed for use by the Commission.

Line (2a) of TABLE 1 shows the results of six auctions, notably broadband PCS auctions, in which DEs had only bidding credits to compete against large incumbent carriers participating actively in the auction. As the Commission predicted, DE success withered in the face of competition from these deep-pocketed entities. In those circumstances, DEs placed \$2.5 billion of the \$13.5 billion in net winning bids — representing only 19 percent of the total value. Moreover, this percentage includes the value of the broadband PCS licenses won in Auction 35 by Salmon PCS, LLC (“Salmon PCS”), a single DE whose results in the Open portion of the auction distorts the overall data. Salmon PCS won 79 licenses (35 Open and 44 Closed) for a net price of \$2.3 billion. If the net winning bids of Salmon PCS, are excluded, DEs won just \$0.9 billion in this category — representing a mere 6 percent of the total value.

This point is further illustrated when one compares these figures with the data from auctions where DEs were *not* bidding against large incumbent carriers. Line (2b) of TABLE 1 illustrates that DEs placed \$1.0 billion — or 51 percent of the value — of the net winning bids in nine auctions where large incumbent carriers did not participate aggressively. (In this respect, these nine auctions were somewhat like Closed Bidding events.) Likewise, as depicted in Line (4) of TABLE 1, in the 28 small and relatively minor auctions (with under \$50 million in aggregate net winning bids), the net winning bids placed by DEs represented 33 percent of the value of all net winning bids.

Finally, Line (3) of TABLE 1 illustrates that DEs were even less successful in five auctions in which there was neither Closed Bidding nor bidding credits. In these instances, DEs placed only one percent of the total \$9.8 billion in net winning bids.

Separately, CTIA argues that “bidding credits are a better vehicle for enabling small businesses to acquire licenses than closed bidding.”³ In making this claim, however, CTIA relies only on the absolute number of licenses won by DEs in Commission auctions for support of this claim.⁴ As demonstrated in TABLE 2, however, relying only on the absolute number of licenses won is misleading.

TABLE 2

DE Winnings for 50 Auctions – by No. of Licenses					
Groupings for Auctions > \$50 Million	Wireless Licenses Won			Avg. License Value (\$ millions)	
	DEs	Total	DE %	DE	Non-DE
(1) Closed broadband PCS license auctions for Entrepreneurs only	1,476	1,476	100%	\$11.2	\$0.0
=====					
(2) Open auctions with bidding credits:					
(2a) Auctions with dominant large carrier bidders	301	1,942	15%	8.4	6.7
{Without Salmon PCS outlier}	{257}	{1,942}	{13%}	{3.3}	{6.7}
=====					
(2b) Auctions without dominant large carrier bidders	3,456	6,186	56%	0.3	0.3
=====					
(3) Auctions without bidding credits or Closed licenses	141	1,089	13%	1.0	10.2
=====					
(4) All small auctions (<\$50 million)	8,580	15,040	57%	0.0	0.0
=====					
Total 50 ⁽⁵⁾ wireless auctions	13,954	25,733	54%		
=====					

As indicated in TABLE 2, DEs have won 13,954 licenses in Commission spectrum auctions. Thousands of those licenses, however, are of significantly less value than broadband PCS spectrum. For example, DEs won 8,580 licenses in the 28 small auctions summarized in Line (3) of TABLE 2, where the average license was worth just over \$9,000. Aggregate DE net winning bids for those licenses were just \$79 million. Line (2a) of TABLE 2 shows the results of six auctions in which DEs used bidding credits to compete against large incumbent carriers participating actively in the auction. There, DEs won 301 licenses — only 15 percent of the total available — worth an average of \$8.4 million. In contrast, as indicated in Line (1) of TABLE 2, in Closed Bidding DEs won 1,476 licenses worth an average of \$11.2 million.

Endnotes:

- ¹ CTIA Petition at 16.
- ² Competitive Bidding Fifth MO&O, 10 FCC Rcd at 414-15.
- ³ CTIA Petition at 9.
- ⁴ *See id.*